conversion only if the word "ton" in the phrase "vessel below 75 tons" refers to a measure of weight and not of space. Incidentally a metric ton which has 1,000 kilograms is simply .914 tons. That is how 75 tons converts to 76 metric tonnes. This subsidiary legislation quite clearly indicates that the "ton" referred to here is a measure of weight and not one of space.

I would be loathe to have recourse to a subsidiary legislation to construe a section of the main Act though I must confess I am not precluded from doing so having regard to the decision in *exp. Wier,*[1] where James and Mellish L.JJ. said "that, where the construction of the Act is ambiguous and doubtful on any point, recourse may be had to the rules which have been made... under the authority of the Act, and if we find that in the rules any particular construction has been put on the Act, that it is our duty to adopt and follow that construction". However, in all the circumstances to resolve the ambiguity I would construe that when the legislature here used the phrase "any vessel below 75 tons" without specifying what type of "ton" was intended it really intended the phrase to mean "any vessel whose gross registered tonnage and its displacement tonnage are both below 75 tons".

As the loaded displacement tonnage of the said vessel was above 75 tons it was not liable to forfeiture under the said section.

In respect of the second complaint I agree that under the said section before an order for forfeiture can be made there should be a proper seizure of the said ship under the said section.

It is common ground that the said vessel was seized by an Assistant Controller of Immigration when it was used for the commission of an offence under the said Act. The only question is did that officer have the necessary written authority either general or special of the Controller for making this seizure. Under section 3(2) of the Immigration Act for any Assistant Controller to exercise the powers and discretion vested in the Controller by the said Act he must be duly authorised in writing in that behalf by the Controller. Reading this provision with the provision in sub-section (1) of the said section for a proper seizure the officer concerned should have been duly authorised by the Controller in writing. On the evidence it is not clear whether he had such authority and if I had to make a ruling on this point I would say as there is no proper evidence before me that he had such authority the seizure here would be bad and hence the forfeiture too would be bad.

As regards the third ground of complaint if there is satisfactory evidence that the said vessel was used in the commission of an offence under the Act as here it is immaterial whether the owner had knowledge or consented to it. I see no substance in this complaint.

For these reasons this application is allowed and the order for forfeiture of the said vessel is set aside. The applicant shall have the costs of this application.

Application allowed.

Solicitors: *Lee & Lee.*

A MALAYSIAN REPORTS

BIAN CHIANG BANK BHD. v. KWONG HING CHEONG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Chang Min Tat F.J.) April 26 and June 14, 1978]

[Kuching — Federal Court Civil Appeal No. 153 of 1977]

B

Banking — Overdraft account — Claim by bank for repayment — Defence of limitation — From when time for limitation ran — Payments made to account — Revival of time for suing — Limitation Ordinance (Sarawak Cap. 49), s. 20(1).

Practice and Procedure — Limitation — Claim by bank for repayment of overdraft account — When time for limita-
C *tion would run — Payments to account — Limitation Ordinance (Sarawak Cap. 49), s. 20(1).*

In this case the respondent had an overdraft account with the appellant bank. There were no terms and conditions for the loan, save as to the condition for repayment, which was necessarily to be implied. The account was opened in May 1962 and on December 31, 1971 the account stood at $10,272.24 which was the sum claimed. The respondent had paid various
D sums into the account, the last payment being for $100 in December 15, 1969. The appellant bank demanded repayment of the overdraft by notice in writing on December 15, 1971 and when this demand was not complied with, it commenced the action on February 9, 1972. The defence of the respondent was limitation, the period prescribed by the Limitation Ordinance (Cap. 49, Sarawak) being three years. The learned trial judge held that in the circumstances of this case no demand for repayment was necessary to make the overdraft an
E enforceable debt and that the overdraft become due and payable at the time when each loan was made. He held that the claims before February 8, 1969 were statute barred but the claims after that date were not. He also ordered that the moneys paid in by the respondent between these two dates be set off against the sum found due and owing by it to the Bank. The appellant bank appealed.

Held, allowing the appeal: although the learned trial
F judge was correct in holding that no demand for repayment was necessary to make the overdraft an enforceable debt and that time ran from the time each loan was made, he failed to give effect to the payments made by the respondent. On a proper interpretation of section 20 of the Limitation Ordinance, it did not appear to be a matter of much importance if the payment which would make for a new period of limitation was towards interest only or towards part of the capital. If there was such a payment, it would revive the time for suing;

G (2) in this case the payment on December 15, 1969 prevented time from running out, so that on the taking out of the writ on February 12, 1972, the claim had not become statute-barred.

Cases referred to:-

(1) *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110.

(2) *Bradford Old Bank* v. *Sutcliff* [1918] 2 K.B. 832.
H

(3) *Parr's Banking Co. Ltd.* v. *Yates* [1898] 2 Q.B. 460.

FEDERAL COURT.

Patrick Tan for the appellants.

Lee Chuan Eng for the respondents.

Lee Hun Hoe C.J. (Borneo): I have the advantage
I of reading the judgment of my learned brother, Chang Min Tat F.J., with which I concur. I would like, however, to add a few words. The facts were set out clearly in that judgment.

Appellants contended that time only began to run when demand was made and it was made on December 15, 1971. After demand, the overdraft then became an enforceable debt and time began to run from

that moment. The writ having been taken out on February 9, 1972, the claim was not statute-barred. In support, appellants cited *Joachimson* v. *Swiss Bank Corporation.*[1] In that case, a partnership having been dissolved by death on August 1, 1914, the question arose whether the sum of £2321 standing to the firm's credit on current account at that date, no demand for payment having been made, constituted at that time, an immediate recoverable debt affording a cause of action to the firm for money lent or money had and received. The Court of Appeal held that where money was standing to the credit of a customer on current account at a bank a previous demand was necessary before an action could be maintained against the bank for the money.

In the present case the position is in reverse in that the bank is the creditor and the customer the debtor. In the absence of any evidence of any term that the overdraft was repayable on demand, the learned judge rejected the appellants' contention. He considered that the liability existed as soon as the loan was made and the right of action on each item arose as soon as each item became due and was not paid and time ran from that date in respect of each item. *Bradford Old Bank* v. *Sutcliff*[2] and *Parr's Banking Co. Ltd.* v. *Yates*[3] were cited to support his view. Consequently, he held that a demand for payment of the overdraft was not necessary in order to make the overdraft an enforceable debt but that the overdraft became due and payable at the time when it was made and time ran from that moment. A banker is not likely to allow an overdrawn account to be dormant for too long as to exceed the limitation period without some payment on account or of interest, or some acknowledgment sufficient to bar the statute.

The learned judge also rejected the appellants' contention that where both principal and interest were due, the sums paid into the bank and credited to respondents' current account must be taken first to apply to interest. He pointed out such contention was rejected in *Parr's case* when the court held that the rule with regard to the appropriation of payments by which interest was presumed to be paid before principal was not applicable in the case of interest on overdrawn account which, according to practice of bankers, had from time to time been converted into principal. The result is that he held that appellants had failed to bring their case within the provisions of the Sarawak Limitation Ordinance (Cap. 49) so that respondents succeeded partially in that the claim prior to February 8, 1969 was statute-barred but the claim from February 9, 1969 to December 31, 1971 was not statute-barred.

Section 20(1) of the Limitation Ordinance reads:—

"20.—(1) When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part payment of the principal of a debt, the fact of the payment shall appear in the handwriting of the person making the same."

No matter how the payments made by the respondents are to be treated, it would not affect the true nature of the debt itself. The record of the current account shows the debtor-creditor relationship of the parties. In an overdrawn current account the banker becomes the creditor and the customer the debtor. The whole transaction is recorded in one entire account into which all liabilities and payments are carried in order of date showing a course of dealing extending over a considerable period of time. The true nature of the debtor's liability is, in my judgment, a single and undivided debt for the amount of the balance due on the account for the time being without regard to the several items which, as a matter of history contribute to that balance. There is no evidence to show the payment made by the respondents was to meet any particular item. It seems to me that by making a payment generally on account the respondents made it on account of the whole of his indebtedness. In other words, the payment was on account of the balance outstanding and due at the date of payment. In the same way, appellants could not be taken to have made an appropriation of the payment to any particular item or items for the purpose of section 20(1) of the Limitation Ordinance.

I agree entirely with Chang Min Tat F.J. that in construing this section it makes no difference whether the payment which would make for a new period of limitation is towards interest only or towards part of the capital. The last payment of $100 made on December 15, 1969 would seem to revive the time for suing. Such a payment, in my judgment, constitutes a payment in respect of the balance outstanding for the purpose of section 20(1) of the Limitation Ordinance. As appellants sued respondents on February 7, 1972, therefore, the claim was not statute-barred. I would also allow the appeal with costs here and the court below.

Chang Min Tat F.J. (read by Lee Hun Hoe C.J. (Borneo)): The respondent was a customer of the appellant bank and enjoyed overdraft facilities in its account current with the bank. Its account was opened on May 18, 1962 with a deposit of $600 and three days later went into the red with a withdrawal of $1,000. It is correct to say that thereafter, it never strayed into the black. It was always in debit. Up to sometime in 1965, it stayed below $5,000. There is a notation on the first page of its ledger account in the bank of $5,000 but whether this was the limit of its overdraft facilities has not been explained by anyone, though for a long time the account stayed below this limit. But the account stayed active only up to October 1962, that is for a period of only 6 months and thereafter any payment made was for the apparent purpose of keeping the debit balance under $5,000. This effort to keep below $5,000 was made until 1966, when the financial standing of the respondent became such that it gave up the struggle. The debit slowly mounted with the accumulation of interest until on December 31, 1971, the account stood at $10,272.24 which was the sum now claimed by the Bank. From the photostat copy of the respondent's ledger accounts, the respondent paid into its overdraft accounts certain moneys in December 17, 1962, again in 1964, and in December 1966. On December 23, 1967 it paid in $300. The last payment was $100 on December 15,

1969. There was never a period exceeding 3 years between any two consecutive payments.

The Bank demanded repayment of the overdraft by a notice in writing on December 15, 1971. When this demand was not complied with, it commenced this action on February 9, 1972.

The defence of the respondent relied squarely on limitation. The period prescribed by the Limitation Ordinance (Cap. 49, Sarawak) is 3 years.

The defence on limitation was determined as a preliminary issue and the learned judge came to the finding that the claims before February 8, 1969 were but the claims from February 9, 1969 to December 31, 1971 were not barred by statute, the suit being filed on February 7, 1972. He also ordered that moneys paid in by the respondent between these two dates be set off against the sum found due and owing by it to the Bank.

This case posed certain difficulties which all sprang from the fact that the overdraft facilities were granted apparently without any terms and conditions, save as to the condition for repayment, which was necessarily to be implied. Rule 11 of the Bank's Rules governing the operation of all current accounts states that overdrafts are allowed only after due arrangement has been made with the Bank. The arrangement in this case would, however, appear to have been made orally and in the absence of any averment in the statement of claim which the respondent admitted, in the absence of any affidavit evidence that such a term existed, there does not appear to be any term that the overdraft was repayable on demand.

Not surprisingly therefore, the learned trial judge held that in the circumstances no demand for repayment was necessary to make the overdraft an enforceable debt, and that the overdraft became due and payable at the time when each loan was made. Time ran from that date: *Bradford Old Bank* v. *Sutcliffe*[2] and *Parr's Banking Co. Ltd.* v. *Yates.*[3] The last advance of $1,000 was made on December 18, 1963, though that was against a payment in of $1,000 the previous day. Thereafter the only life shown in the account was the regular debiting of monthly interests and a few and very sporadic payments by the respondent. In his judgment, the claim for repayment was statute-barred.

However, the fact of the payments by the respondent must, in my view and with respect, be given its full significance.

Section 20(1) of the Limitation Ordinance (Cap. 49, Sarawak) reads as follows:

"20.—(1) When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy or by his agent duly authorized in this behalf, or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part payment of the principal of a debt, the fact of the payment shall appear in the handwriting of the person making the same."

On a proper interpretation of this section, it does not appear to be a matter of much importance if the payment which make for a new period of limitation is towards interest only or towards part of the capital. If there was such a payment, it would revive the time for suing.

The last payment was of $100 on December 15, 1969 and in my view and with respect, this payment prevented time from running out so that on the taking out of the writ on February 12, 1972, the claim had not become statute-barred.

I would therefore allow the appeal with costs here and the court below. There will be judgment for the plaintiff as prayed.

Suffian L.P. concurred.

Appeal allowed.

Solicitors: *Yong & Co.; Ee & Lim.*

TAN KIT THONG v. NG SIONG HONG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Chang Min Tat F.J.) April 26 and June 14, 1978]

[Kuching — Federal Court Civil Appeal No. 155 of 1977]

Landlord and Tenant — Rent controlled premises — Claim for possession — Rent in arrears — Rent increased by mutual agreement — No necessity to terminate tenancy before increase — Rent Control Ordinance, (Sarawak Cap. 86), ss. 4 & 8.

In 1961 the appellant became the tenant of the front portion of the ground floor of premises in question at a rent of $220 per month. The owner of the premises subsequently sold it to the respondent. Following an increase in assessment rates the appellant agreed to an increase of the monthly rent on September 1, 1966 to $230. The appellant was in arrears of rent from September to November 1970 and the respondent sent him a notice in Chinese dated November 6, 1970 demanding payment but the appellant made no payment. Notice to quit was served on the appellant and the respondent subsequently brought an action for possession, rent and mesne profits. The High Court gave judgment in favour of the respondent and the appellant appealed.

Held, dismissing the appeal: (1) in this case the rent had been lawfully increased and as the increase was by mutual consent within the limits allowed by law, there was no necessity to terminate the tenancy first;

(2) the rent was in arrears and as it was not paid after demand, the respondent was entitled to have possession.

Case referred to:-

(1) *Sim Bang Hock* v. *Lim Kwong Sin* [1970] 1 M.L.J. 124, 125.

FEDERAL COURT.

Daniel Tejem for the appellant.

J.C. Fong for the respondent.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned judge ordering appellant to deliver up possession of premises described as No. 146, Padungan Road, Kuching and to pay arrears of rent, mesne profits and costs.

In 1956 Chong Thong bought the premises which were then occupied by a confectioner who later surrendered the first floor and front portion of the ground